**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| In the Matter of | ) | |
| | ) | |
| Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming | ) | CS Docket No. 95-61 |



**REPLY OF RIDGEBURY TOWNSHIP, PENNSYLVANIA AND THE PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS TO THE COMMENTS OF JAMES CABLE PARTNERS, L.P.**

## I. INTRODUCTION

The within comments are submitted by Ridgebury Township ("Ridgebury") and the Pennsylvania State Association of Township Supervisors ("PSATS") pursuant to the Notice of Inquiry ("NOI") released May 24, 1995. These Reply Comments respond to the Comments submitted by James Cable Partners, L.P. ("James") addressing the questions posed in Paragraph 29 of the NOI regarding exclusivity and competition in the cable television industry.

Ridgebury is a township of the second class, a municipal government located in Bradford County, Pennsylvania. PSATS is an association formed under statutory authority, and comprised of more than 1400 municipal government members, representing the interests of townships of the second class throughout Pennsylvania. PSATS' offices are located at 3001 Gettysburg Road, Camp Hill, Cumberland County, Pennsylvania.

Section 621(a) of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), 47 U.S.C. § 541(a), prohibits a franchising authority from

unreasonably refusing to award a franchise to a qualified applicant.[1] The effect of the legislation is to preclude exclusive franchises. The principal question herein addressed is whether the law applies retroactively and whether the statute should be amended to clarify such retroactivity.

As the Commission is well aware, a split has developed between the federal circuit courts of appeal as to whether § 621(a) applies prospectively to all denials of franchises including those that would compete with existing exclusive franchises.[2] Ridgebury and PSATS support the position of the FCC that § 621(a) applies to municipalities where there are pre-existing exclusive franchises; consequently, we also support the proposed amendment to § 621(a) that would clarify the law and firmly resolve the current debate. James, on the other hand, disagrees with the position of the FCC concerning the retroactive application of the 1992 Cable Act. For the reasons discussed below, we suggest the position supported by James contradicts the clear policies of the 1992 Cable Act without providing a convincing rationale as to why those policies should not be implemented to the fullest extent possible. Further, the result argued for by James would perpetuate a confusion in the decisional law

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[1] 47 U.S.C. § 541(a)(1) states: "A franchising authority may award, in accordance with the provisions of this chapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise."

[2] *See Cox Cable Communications v. United States*, 992 F.2d 1178 (11th Cir. 1993) (holding 1992 Cable Act required any exclusivity provisions to be eliminated from any currently existing franchise agreements); and *James Cable Partners, L.P. v. Jamestown, Tennessee*, 43 F.3d 277 (6th Cir. 1995) (holding the 1992 Cable Act did not apply retroactively to existing exclusive franchises).

and would blunt the clear intent of the legislature to remove the exclusivity feature from the cable television company/municipal government equation.

## II. DISCUSSION

In the NOI, the FCC raised the following three questions:

(a) To what extent do cable systems have exclusive franchises?

(b) How many, if any, applications for competitive franchises have been filed since the enactment of the 1992 Cable Act? How many competitive franchises have been awarded? How many have been denied? Has Section 621(a) promoted the award of competitive franchises?

(c) To what extent have the activities of local franchising authorities been an impediment to overbuilding by additional cable systems? Have incumbent cable operators used local franchising processes to delay or prevent overbuilding.[3]

### A. "To what extent do cable systems have exclusive franchises?"

James offered four arguments in response to this question, to which PSATS and Ridgebury respond as follows:

First, James stated that it was unable to locate information that indicates how many exclusive franchises existed prior to the 1992 Cable Act, but that it nonetheless believed few exclusive franchises existed.[4] We are similarly unable to develop reliable empirical

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3 *Notice of Inquiry*, ¶ 29.

4 *Comments of James Cable Partners, L.P.* at 3-4.

information as to the number of extant exclusive franchises. Anecdotally, however, PSATS can report that it has received a number of requests for information and assistance from member townships arising out of negotiations and/or disputes between the townships and exclusive franchises. More specifically, Ridgebury is presently encumbered by a purported exclusive franchise agreement. We suggest one may reasonably conclude that the rural and mountainous nature of many Pennsylvania townships combined with the relative unsophistication of some rural governments and the market forces which drive the exclusivity feature will have resulted in a substantial number of exclusive franchises, demanded by companies and granted by governments at times when few, if any, viable alternatives existed.

The number of existing exclusive franchises is less important than the impact of such franchises on the markets that they supposedly serve. The experience of Ridgebury with a cable company operating under an exclusive franchise demonstrates exactly why retroactive application is necessary. Prior to the 1984 Cable Act, Ridgebury awarded to a cable television company an exclusive franchise which is currently still in effect. Despite continuous complaints concerning the quality and variety of services provided by the operator for the past ten years, Ridgebury has been unable to force adequate corrective action and has been unable to award an additional competitive franchise because of the exclusivity provision in the current franchise agreement. Clearly, the possibility of a competitive franchise in the township would force the current operator to respond more effectively to the concerns and problems of the township's residents, thereby improving service to the entire community.

James asserts that other forms of competition exist such that retroactive application of § 621(a) is unnecessary.[5] However, § 621(a) is not concerned with those other forms; rather, it specifically seeks to promote competition between cable television services. Consequently, to fully achieve this goal, any provision granting an exclusive franchise must be eliminated from existing franchise agreements.

Second, James argued that § 621(a) should not apply retroactively because no exclusive franchises have been awarded since the 1992 Cable Act was enacted.[6] The mere fact that franchising authorities have acted in accordance to the law since the 1992 Cable Act does nothing to validate or support the continuation of exclusive franchises which the legislature has clearly determined to be contrary to public policy. If anything, the improvements in service that have undoubtedly resulted from increased competition in the marketplace would support the notion that existing exclusive franchises should be subject to a competitive market.

Third, James asserts that applying § 621(a) retroactively would conflict with the legislative intent of Congress in enacting the 1992 Cable Act.[7] Ridgebury and PSATS, however, agree with the FCC that the Eleventh Circuit's decision in *Cox Cable Communications v. United States*, 992 F.2d 1178 (11th Cir. 1993), represents the proper interpretation of the statute. The *Cox* court specifically stated that the text of the statute

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5 *Id.* at 4-5.

6 *Id.* at 5-6.

7 *Id.* at 6-8.

demonstrated the intent of Congress to have the statute apply to all denials of competitive cable franchises.[8]

James relies upon the reasoning in *James Cable Partners, L.P. v. Jamestown, Tennessee* to attack the *Cox* decision. In *James Cable*, the court emphasized the presumption against retroactivity discussed by the Supreme Court in *Landgraf v. USI Film Prod.* __ U.S. __, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994).[9] *Landgraf* involved the Civil Rights Act of 1991, however, and we respectfully suggest the Sixth Circuit incorrectly extended the principles discussed in *Landgraf* to justify an interpretation of the 1992 Cable Act and a result that clearly conflict with the policy of the legislation.

In addition, the *James Cable* court misconstrued the preemption provision of the 1984 Cable Act.[10] The court stated that the provision did not apply because § 621(a) did not create a conflict with existing exclusive franchises.[11] Had the court adopted the *Cox* interpretation of the statute, however, this preemption provision would clearly require the elimination of exclusivity provisions in any existing franchises. Congress clearly stated its

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8 *Cox*, 992 F.2d at 1182.

9 *James Cable*, 43 F.3d at 279-80.

10 47 U.S.C. § 556(c) states: Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provisions of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

Section 557 lists various provisions of existing franchise agreements that are unaffected by the preemption provision; the list does not include exclusivity provisions.

11 *Id.* at 281.

desire that the 1992 Cable Act should eliminate existing exclusive franchises. The *Cox* decision is squarely in accordance with that legislative purpose.

Fourth, James asserts that applying § 621(a) retroactively would be unfair and unconstitutional. This assessment is refuted by both *Cox* and *James*. On remand following the Eleventh Circuit's decision in *Cox*, the district court specifically held that the statute could be applied retroactively without violating the constitution.[12] Moreover, in the *James Cable* decision in the district court, the court, finding for James on the issue of retroactivity, stated that if the statute did apply retroactively, it would not violate the constitution.[13] Thus, the arguments asserted by James concerning the alleged unconstitutionality of retroactive application of the 1992 Cable Act have been uniformly rejected by the courts.

**B. How many, if any, applications for competitive franchises have been filed since the enactment of the 1992 Cable Act? How many competitive franchises have been awarded? How many have been denied? Has Section 621(a) promoted the award of competitive franchises?**

As with the first question discussed above, James could not locate any empirical data that addressed the issues raised by the second set of questions. Instead, it offered a series of hypotheses concerning why a franchise might be denied.[14] Ridgebury does not dispute

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12 *See Cox Cable Communications v. United States*, 866 F. Supp. 553 (M.D. Ga. 1994).

13 *See James Cable Partners, L.P. v. Jamestown, Tennessee*, 822 F. Supp 476 (M.D. Tenn. 1993).

14 *Comments of James Cable Partners, L.P.* at 12-13.

that such theories represent possible reasons why a franchise may be denied; nevertheless, Ridgebury can testify from its firsthand experience that an already existing exclusive franchise continues to create barriers for at least one franchising authority. The factual circumstances surrounding the Ridgebury matter are not unusual or unique. They may be expected to arise frequently in other communities. Because Ridgebury believes it is not alone in the dilemma it faces, as both *Cox* and *James Cable* indicate, Ridgebury and PSATS strongly support the proposed amendment to § 621(a) to confirm the applicability of the provision to such situations.

### C. To what extent have the activities of local franchising authorities been an impediment to overbuilding by additional cable systems? Have incumbent cable operators used local franchising processes to delay or prevent overbuilding?

In response to this third set of inquiries, James expresses a perceived need for caution in the attempt to open up the market to competitor franchises.[15] Although Ridgebury agrees that development of competition should not be instituted without care, it does not share James' apparent concern that such processes are likely to be conducted in an unfair or prejudicial manner.

In fact, the dangers of an open market, whatever they may be perceived to be, do not offer support for the continuation of the irrational and contradictory situation which will persist if retroactivity is not applied to the exclusive franchise prohibition. If *James'* view were accepted, in Municipality A market forces would be allowed to operate simply because

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15 *Id.* at 14.

there was no preexisting exclusive franchisee, while in Municipality B market forces would be thwarted simply because there was an existing exclusive franchisee. There is no rational basis for the distinction and no demonstrable reason why the "dangers" of an open market should be visited upon A, but withheld from B.

## III. CONCLUSION

James concludes that the questions posed by the FCC "may not fully illuminate the debate regarding opening the local market to retail video programming competition."[16] James further suggests that an empirical case cannot be made for retroactive application, and even if one could be made, considerations of fairness and constitutional rights support the continued existence of exclusive franchises. As shown above, however, it has already been conclusively determined that constitutional rights are not affected. Further, both the statutory and decisional law contain adequate protection with respect to fairness considerations. Finally, PSATS and Ridgebury suggest that the questions posed by the FCC indicate an emphasis upon statistical information, whereas the equitable and policy considerations clearly demonstrate that, regardless of the numbers involved, retroactive application is needed to ensure full implementation of the policies of the 1992 Cable Act. Many municipalities, when initially confronted by cable television franchise issues, due to their lack of prior experience and the demand for better television service, were virtually compelled to grant exclusive franchises. Not all of the franchisees have adequately performed their responsibilities. Retroactive application of the statute goes far to correct

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16 *Id.*

that imbalance and to afford communities a means by which adequate performance of franchise obligations is assured. Thus, PSATS and Ridgebury support the present position and course of action taken by the FCC because we believe it will accurately implement clear legislative policy and will serve the needs of the greatest number of individuals and communities.

Respectfully submitted,

RIDGEBURY TOWNSHIP and the
PENNSYLVANIA ASSOCIATION OF
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